

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NANCY MORTENSEN,)	
)	NO. CV-10-3006-LRS
Plaintiff,)	
)	ORDER GRANTING IN PART
v.)	AND DENYING IN PART
)	DEFENDANTS' MOTION FOR
CITY OF GRANGER; OFFICER R. J.)	SUMMARY JUDGMENT
KAMPERT and RAMONA FONSECA;)	
)	
Defendants.)	

Before the Court is Defendants' Motion for Summary Judgment (ECF. No. 18) filed pursuant to Fed. R. Civ. P. 56(b) on March 8, 2011, and noted without oral argument. Plaintiff Nancy Mortensen requested oral argument, which was granted, and a hearing was held on May 4, 2011 in Yakima. Patrick McMahon participated on behalf of Defendants; William Pickett participated on behalf of Plaintiff. The court also heard other collateral pending motions. At the conclusion of the hearing, the court placed Defendants' motion for summary judgment under advisement.

I. BACKGROUND

Plaintiff Nancy Mortensen, a Granger Public Works' employee, brings this action for economic and non-economic damages allegedly sustained when she was verbally told that she was being arrested by Defendant Kampert on May 14, 2008 in Granger, Washington for allegedly taking an ice-cream sundae with strawberries worth \$2.50 without making payment to the City of Granger's Dinostore snack bar. Plaintiff filed a notice of claim with the City of Granger on January 8, 2009. Plaintiff originally filed her Complaint on

1 January 29, 2010 in the Yakima County Superior Court. Defendants
2 filed for removal to federal court on February 10, 2010.
3 Plaintiff asserts claims of Fourth Amendment violations,
4 unlawful/false arrest and seizure pursuant to 42 U.S.C. § 1983,
5 abuse of process, and negligence.

6 **II. SUMMARY OF FACTS FROM EACH PARTIES' PERSPECTIVE**

7 The facts important to resolution of the issues at hand are
8 hotly disputed. The following facts are undisputed, except where
9 otherwise indicated.

10 On May 14, 2008, the acting Chief of Police for Granger,
11 Shane Mortensen gave Officer Kampert the assignment of
12 conducting an investigation of a possible theft of an ice-cream
13 sundae involving a Granger Public Works' employee, Plaintiff Nancy
14 Mortensen. As part of the investigation, the acting Chief handed
15 Officer Kampert a typed statement dated May 12, 2008 and authored
16 by Defendant Mayor Fonseca's husband, Hector Fonseca, wherein Mr.
17 Fonseca observed the Plaintiff take a bowl of ice cream and
18 strawberries from the Dinostore. The statement from Mr. Fonseca
19 indicates that he asked an employee at the time whether the ice
20 cream item had been paid for and Mr. Fonseca was told that
21 Plaintiff Mortensen had not paid for the sundae.

22 On May 14, 2008, Officer Kampert contacted Mr. Fonseca who
23 stated that he observed Plaintiff Mortensen getting ice cream and
24 strawberries and leaving the store without observing her pay for
25 the items. Mr. Fonseca further informed the officer that he asked
26 Dinostore employee Amber Moreno whether Mortensen had paid for the
27 ice cream and Moreno replied "no." Officer Kampert contacted
28 Dinostore employee Amber Moreno, subsequent to interviewing Mr.

1 Fonseca, and was told that Ms. Mortensen procured the ice cream
2 item, did not ring in the sale, and left the Dinostore with the
3 item. Ms. Moreno provided a signed statement regarding her
4 observations of Ms. Mortensen dated May 14, 2008.

5 Subsequent to this investigation, Officer Kampert requested
6 Ms. Mortensen to meet him at the Granger Police Station. Officer
7 Kampert advised he was conducting a criminal investigation for
8 theft and began reading Ms. Mortensen her Miranda warnings. Ms.
9 Mortensen requested that her supervisor (Jack Burns) and a union
10 representative be present before they proceeded further.
11 Plaintiff Mortensen was advised that, because this was a criminal
12 investigation, her supervisor and union representative were not
13 entitled to be present.

14 Plaintiff Mortensen's Miranda warnings were read to her
15 and she stated she understood her rights. Subsequently, Plaintiff
16 Mortensen waived her right to remain silent and agreed to discuss
17 the criminal investigation with the police officer. After waiving
18 Miranda, Plaintiff Mortensen stated she had receipts for
19 everything she purchased.

20 According to Plaintiff, she has been an exemplary employee of
21 the City of Granger for the last five years, and often works
22 behind the counter of the City owned Dinostore snack bar. On or
23 about May 12, 2008 at 3:00p.m., Plaintiff entered the Dinostore
24 with the intent to purchase an ice-cream sundae. Only two other
25 parties were present in the store at this time: a seated
26 customer, Robert Rodriguez and Dinostore employee Amber Moreno.
27 Prior to obtaining the ice-cream, Plaintiff walked to the store's
28 cash register, ringing in her purchase and then paying \$2.50 into

1 the till. This transaction was recorded on the register's
2 internal receipt roll as: DATE: 5/12/2008 MON TIME 15:06 - Total
3 \$2.50. Plaintiff then walked over to the ice-cream machine and
4 prepared her own strawberry sundae. While Plaintiff was placing
5 the strawberries on her sundae, Hector Fonseca (spouse of the
6 City's Mayor, Defendant Ramona Fonseca) entered the store.
7 Hector Fonseca walked up to Plaintiff, looked at the ice-cream
8 sundae and stated, "Is that for me?" to which Plaintiff replied
9 "no," and walked out of the store with the sundae. ECF No. 1,
10 Complaint, ¶4.1.

11 Defendants state there was in effect a Public Works' policy
12 regarding employees not ringing up their own purchases and
13 requiring employees to identify, with their name on the receipt,
14 purchases made from the Dinostore. Officer Kampert was also
15 aware, prior to his contact with Plaintiff Mortensen on May 14,
16 2008, that the Public Works' policy regarding employee purchases
17 from the Dinostore, had been explained to the various departments
18 within the City of Granger. Plaintiff was aware of the policy.
19 Plaintiff had not signed any paperwork for this policy.

20 Plaintiff also states that, at times, there may not have been
21 enough money to ring in a particular transaction on the cash
22 register, so a handwritten receipt would be prepared and added to
23 the register the following day.

24 The Plaintiff was allowed to leave the police station on her
25 own and meet Officer Kampert at the Dinostore. Upon arrival at
26 the Dinostore, Officer Kampert asked employees Maria Botello and
27 Amber Moreno if either knew anything about "handwritten receipts"
28 and they stated they didn't know about them. At the store, the

1 Plaintiff went to a desk and produced a handwritten receipt for
2 three candy bars and a bag of chips totaling \$3.00, initialed
3 "N.M." and dated May 13, 2008. Plaintiff Mortensen was advised
4 that she was under arrest.

5 Plaintiff Mortensen then showed Officer Kampert a cash
6 register receipt dated May 12, 2008, which suggested that a
7 transaction occurring at approximately 15:00 hours purportedly
8 representing the \$2.50 ice cream with strawberries allegedly
9 stolen from the Dinostore by the Plaintiff. After being shown the
10 register receipt by Plaintiff Mortensen, Officer Kampert rejected
11 the receipt as proof that she paid for the ice-cream and
12 strawberries because he was not able to discern who rang up the
13 item, or whether the item was actually paid for by Plaintiff
14 Mortensen.

15 During the investigation, and subsequent to being verbally
16 informed that she was under arrest, the Plaintiff was never
17 handcuffed or booked into jail. Plaintiff was never issued a
18 criminal citation for Theft Third Degree or for any crime and no
19 criminal charges were filed with any court initiating any criminal
20 proceedings against the Plaintiff.

21 The matter and investigation was referred to the Granger
22 Prosecuting Attorney who, after reviewing the same evidence,
23 purportedly provided the legal opinion that Plaintiff Mortensen
24 should be charged with Theft Third Degree pursuant to RCW
25 9A.56.050. No charges were filed against the Plaintiff, however,
26 with any court.

27 **[PLAINTIFF'S VERSION OF FACTS]**

28 Shortly after Mayor Fonseca was elected in January of 2008,

1 Defendant Kampert informed Officer Dave Leary that he (Sgt.
2 Kampert) had had secret meetings with Defendant Mayor Fonseca, the
3 subject of which was how the department heads could all be fired.
4 The three department heads were: Plaintiff's supervisor Jack Burns
5 at Public Works, Chief Robert Perales at the Police Department,
6 and Alice Koerner the City Clerk. Chief Robert Perales had asked
7 for the resignation of Kampert in 2006, for sexual misconduct and
8 for stalking one of the female City Council members.

9 After Defendant Mayor Fonseca was elected she rehired Officer
10 Kampert in February of 2008 over the protests of Chief Perales.
11 Shortly after Defendant Officer Kampert was rehired, Plainitff
12 asserts that both Kampert and Mayor Fonseca talked another
13 employee into filing a complaint against Chief Perales claiming
14 that he repeatedly tazed her. She was tazed voluntarily at a
15 training class. Because of the alleged tazing incident, Chief
16 Perales was put on administrative leave.

17 Defendant Kampert told Officer Leary that he (Officer Leary)
18 was to report to him (Kampert) anything he observed regarding the
19 department heads that could get them fired. Defendant Kampert told
20 Officer Leary that he (Kampert) had filed a complaint with the
21 State Auditor against one department head, Alice Koerner, the City
22 Clerk. Defendant Kampert bragged to Officer Leary that the City
23 Clerk could not withstand the stress of the complaint and would
24 either resign or be fired.

25 Defendant Kampert bragged to Officer Leary how he (Kampert)
26 attempted to manipulate the investigation of Nancy Mortensen so as
27 to anger department head Jack Burns and thereby goad him into
28 doing something rash, like disorderly conduct or obstruction of

1 justice, so that he would be fired. During the investigation of
2 Plaintiff Nancy Mortensen, Defendant Kampert met with her at the
3 Dinostore. Plaintiff Mortensen brought her supervisor Jack Burns
4 with her. Defendant Kampert ordered Jack Burns to stay away from
5 himself and Nancy Mortensen or he would be arrested for
6 obstruction of justice. This made Jack Burns angry. Jack Burns
7 thought that Defendant Kampert was acting as if he already had
8 determined that he, Jack Burnes, was going to be a problem. He
9 kept threatening to arrest him. Defendant Kampert then announced
10 that Plaintiff Nancy Mortensen was under arrest.

11 The normal procedure for the Granger Police Department in
12 cases of petty theft would be to investigate, take statements and
13 turn a report over to the City Prosecutor. Normally the person
14 would not be arrested. However, Defendant Kampert purportedly
15 bragged to Office Leary that the announcement of the arrest was
16 done for the sole purpose of aggravating Jack Burns, hoping that
17 he would take some step towards disorderly conduct or obstruction
18 of justice.¹ Despite the announcement that Nancy Mortensen was
19 under arrest she was never booked or taken to jail. Although
20 Defendant Kampert maintains that Nancy Mortensen was free to go
21 after he left the Dinostore, Nancy Mortensen did not think she
22 was free to go until the Mayor was called, who in turn called the
23 Police Department and was told she was free to go.

24 Plaintiff Nancy Mortensen was psychologically damaged by the
25 public announcement that she was "under arrest". Chief Perales
26 hired an attorney and was reinstated as Chief of Police. After

27
28 ¹Indeed a large part of Defendant Kampert's report regarding
Nancy Mortensen has to do with Jack Burn's behavior and whether or
not he should be charged with obstructing justice.

1 Chief Perales was reinstated, Defendant Kampert resigned.

2 **UNLAWFUL ARREST AND QUALIFIED IMMUNITY**

3 Defendants argue that Defendant Kampert had probable cause to
4 arrest Plaintiff Nancy Mortensen thereby precluding recovery of
5 damages by Plaintiff on any theory which has been pleaded.

6 The Fourth Amendment requires law enforcement officers to
7 have probable cause before making a warrantless arrest. *Michigan*
8 *v. Summers*, 452 U.S. 692, 700, 101 S.Ct. 2587 (1981). "Probable
9 cause to arrest exists when officers have knowledge or reasonably
10 trustworthy information sufficient to lead a person of reasonable
11 caution to believe that an offense has been or is being committed
12 by the person being arrested." *United States v. Lopez*, 482 F.3d
13 1067, 1072 (9th Cir. 2007). An arrest is unlawful unless there is
14 probable cause to believe a specific criminal statute has been or
15 is being violated. *Devenpeck v. Alford*, 543 U.S. 146, 152, 124
16 S.Ct. 588 (2004). Because probable cause is a wholly objective
17 "reasonable officer" standard, the officer's subjective motivation
18 is irrelevant. *Whren v. United States*, 517 U.S. 806, 813, 116
19 S.Ct. 1769 (1996).

20 An action is "reasonable" under the Fourth Amendment,
21 regardless of the individual officer's state of mind, "as long as
22 the circumstances, viewed *objectively*, justify [the] action."
23 *Scott v. United States*, 436 U.S. 128, 138, 98 S.Ct. 1717, 56
24 L.Ed.2d 168 (1978) (emphasis added). The officer's subjective
25 motivation is irrelevant. See *Bond v. United States*, 529 U.S. 334,
26 338, n. 2, 120 S.Ct. 1462, 146 L.Ed.2d 365 (2000) ("The parties
27 properly agree that the subjective intent of the law enforcement
28 officer is irrelevant in determining whether that officer's

1 actions violate the Fourth Amendment ...; the issue is not his
2 state of mind, but the objective effect of his actions"). Stated
3 differently, motivation and subjective belief are irrelevant
4 except as they may shed light on the sufficiency of the evidence.
5 See *NLRB v. Vegas Vic, Inc.*, 546 F.2d 828, 829 (9th Cir.1976).

6 The Court is required to construe the testimony most
7 favorably to Plaintiff, as the non-moving party. The current
8 record shows that Defendant Kampert had purportedly been advised
9 by Defendant Mayor Fonseca to closely police and observe various
10 city employees and department heads who she wished to terminate.
11 On or about May 14, 2008, Defendant Kampert contacted Mr. Fonseca
12 (husband of Defendant Mayor Fonseca) and was informed by him that
13 Plaintiff Mortensen had obtained ice-cream and strawberries from
14 the Dinostore and that he did not see Ms. Mortensen pay for the
15 items. Defendant Kampert was advised by Hector Fonseca that
16 employee Amber Moreno had also observed the incident. Based on
17 that information, Kampert interviewed Moreno and was told that
18 Plaintiff in this case had procured the ice-cream item but did not
19 ring in the sale at the Dinostore before she left. This oral
20 statement was later backed up by a signed statement concerning her
21 observations.

22 Based on his investigation, Defendant Kampert requested
23 Mortensen to meet him at the Granger Police Department. Plaintiff
24 was advised by Kampert that he was conducting a criminal
25 investigation for theft and Plaintiff ultimately explained that
26 she had a receipt for the purchase. However, Defendant Kampert
27 concluded that the receipt did not establish actual purchase of
28 the ice-cream and strawberries.

1 In opposing Defendants' Motion For Summary Judgment,
2 Plaintiff submitted a sworn affidavit of Granger Police Officer
3 Dave Leary who stated that Defendant Kampert had "bragged to me
4 about how he had tried to utilize the situation to try to get
5 Public Works Director Jack Burns fired." Leary's affidavit goes
6 on to recite that ". . . Kampert stated that he deliberately tried
7 to start an argument with Jack Burns when he falsely arrested Ms.
8 Mortensen, again in an attempt to get Jack Burns to do something
9 for which he could be arrested and then fired by the mayor."

10 In light of the statements attributable to Defendant Kampert
11 by Officer Leary, the current state of the record reflects the
12 inescapable conclusion that the court cannot find as a matter of
13 law that probable cause for the arrest existed. "The rule is that
14 unless the evidence conclusively establishes the lawfulness of the
15 arrest, it is a question of fact for the jury to determine whether
16 an arresting officer had probable cause." *Daniel v. State*, 36
17 Wash.App. 59 (1983). Assuming the state of the record does not
18 change at trial, the trier of fact will ultimately have to decide
19 the existence of probable cause. Accordingly, summary judgment is
20 not appropriate at this juncture. Testimony will be necessary to
21 decide the underlying factual dispute. Therefore, summary
22 judgment is denied with respect to Plaintiff's unlawful arrest
23 claim.

24 Defendant asks that the court find Defendant Kampert to be
25 protected by qualified immunity because the officer had: 1)
26 carried out a statutory duty; 2) in accord with the procedures
27 dictated to him by statute and superiors; and 3) that he had acted
28 reasonably. However, if credence is given to the Leary affidavit,

1 Kampert cannot be in compliance with all three of the requirements
2 for qualified immunity due to what he apparently acknowledged as a
3 "false arrest." Dismissal of Defendant Kampert, at this juncture,
4 would therefore be inappropriate.

5 **ABUSE OF PROCESS CLAIM**

6 Defendants argue there is no evidence to substantiate the
7 claim that either Defendant Kampert or Defendant Fonseca engaged
8 in abuse of process and that this claim must be dismissed. In
9 order to have a claim for abuse of process, Plaintiff Mortensen
10 must prove the following: (1) the existence of an ulterior purpose
11 to accomplish an objective not within the proper scope of the
12 process; and (2) an act in the use of the legal process not proper
13 in regular prosecution of the proceedings. *Batten v. Abrahams*, 28
14 Wn.App. 737, 745 (1981). The court finds that here, no process
15 issued requiring the presence of the Plaintiff or her property in
16 any judicial proceeding. She was not issued a criminal citation
17 requiring her to appear in court. She was not booked into jail for
18 the alleged criminal offense requiring her to appear before a
19 judge at an arraignment or preliminary hearing. Based on the
20 foregoing, this claim must be dismissed.

21 **INDIVIDUAL NEGLIGENCE (INVESTIGATION/HIRING/SUPERVISION)**

22 As to negligent investigation by Defendant Kampert, a number
23 of Washington cases hold, and Plaintiff's counsel conceded at
24 oral argument, that a Negligent Investigation claim against law
25 enforcement is not cognizable in Washington. See *Keates v.*
26 *Vancouver*, 73 Wn.App. 257-267 (1994). A closely related
27 allegation dealing with negligence attributable to the City of
28 Granger of necessity, would also fail.

1 As to negligent hiring and/or supervision, Defendants assert
2 that Plaintiff's claim must be dismissed. To prove negligent
3 hiring in Washington, the Plaintiff must demonstrate that: (1) the
4 employee knew or, in the exercise of ordinary care, should have
5 known of its' employees unfitness at the time of hiring, and (2)
6 the negligently hired employee proximately caused the resulting
7 injuries. *Carlsen v. The Wackenhut Corp.*, 73 Wn.App. 247, 252-53
8 (1994). Here, there is no negligence for the manner in how
9 the theft investigation of Plaintiff Mortensen was conducted.
10 Consequently, Defendant City is not negligent for hiring a police
11 officer carrying out a police criminal investigation for which he
12 cannot be liable.

13 As to the negligent supervision claim, Defendants argue that
14 there was no negligence by the individual Defendants, and
15 therefore dismissal of any negligent supervision cause of action
16 is appropriate.

17 Plaintiff opposes this argument stating that it was negligent
18 to rehire Defendant Kampert in February of 2008 over the protests
19 of Chief Perales and after Defendant Kampert had resigned
20 following accusations of sexual misconduct and stalking a female
21 employee.

22 The elements of a negligent hiring, supervision, and
23 retention claim include: (1) a general duty on the employer to use
24 reasonable care in the training, supervision; and retention of
25 employees to ensure that they are fit for their positions; (2)
26 breach; (3) injury; and (4) causation. *Snyder v. Med. Serv. Corp.*
27 *of E. Wash.*, 98 Wash.App. 315, 323, 988 P.2d 1023 (1999), *aff'd*,
28 145 Wash.2d 233, 35 P.3d 1158 (2001).

1 The court finds the Plaintiff has failed to show that hiring,
2 failing to supervise or retaining the employee (Defendant Kampert)
3 was a proximate cause of the Plaintiff's alleged injuries. The
4 court finds that all negligence-related claims suffer from a
5 similar fatal deficiency, namely proximate causation. The
6 negligence claims are therefore dismissed.

7 **42 U.S.C. §1983 CLAIM/QUALIFIED IMMUNITY DEFENSE**

8 Section 1983 provides, in pertinent part, that "[e]very
9 person who, under color of any statute ... subjects, or causes to
10 be subjected, any citizen of the United States or other person
11 within the jurisdiction thereof to the deprivation of any rights,
12 privileges, or immunities secured by the Constitution and laws,
13 shall be liable to the party injured" 42 U.S.C. § 1983. A
14 person "subjects" another to the deprivation of a constitutional
15 right, within the meaning of § 1983, if he does an affirmative
16 act, participates in another's affirmative act, or omits to
17 perform an act which he is legally required to do that causes the
18 deprivation of which complaint is made. *Johnson v. Duffy*, 588 F.2d
19 740, 743 (9th Cir.1978). Alternatively, personal participation is
20 not the only predicate for § 1983 liability. Anyone who "causes"
21 any citizen to be subjected to a constitutional deprivation is
22 also liable. The requisite causal connection can be established
23 not only by some kind of direct personal participation in the
24 deprivation, but also by setting in motion a series of acts by
25 others which the actor knows or reasonably should know would cause
26 others to inflict the constitutional injury. *Id.*

27 As discussed above, whether Defendant Kampert had probable
28 cause to arrest Plaintiff for allegedly taking an ice-cream sundae

1 involves disputed fact questions, precluding summary judgment on
2 Plaintiff's alleged First, Fourth and Fourteenth Amendment
3 violations in her § 1983 claim. Assuming that Defendant Kampert
4 did not have probable cause for arrest, the next question is
5 whether the right to be free from unreasonable restraint was well
6 known at the time the incident occurred. In this case, the right
7 had been well established but the question would remain as to
8 whether Defendant Kampert acted reasonably in finding probable
9 cause existed. For the foregoing reasons, summary judgment is
10 denied with respect to Plaintiff's § 1983 claim.

11 **MONELL LIABILITY STANDARD**

12 Under § 1983 a public entity defendant cannot be held liable
13 for a § 1983 violation caused by an individual employee's actions
14 under a theory of respondeat superior. *Monell v. Dep't. of Soc.*
15 *Servs.*, 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).
16 In order to be liable, the defendant must act as a "lawmaker[] or
17 ... [one] whose edicts may fairly be said to represent official
18 policy." *Id.* at 691, 98 S.Ct. 2018. Under *Monell*, municipal
19 liability must be based upon enforcement of a municipal policy or
20 custom that causes the deprivation of a plaintiff's federal right,
21 and not upon the municipality's mere employment of a
22 constitutional tortfeasor. *Id.* To maintain a § 1983 claim against
23 a public entity defendant, or supervisors not personally involved
24 in the alleged violation, a plaintiff must allege that his or her
25 constitutional injury resulted from a policy, practice or custom
26 of the local entity. *Id.* While liability can also be posited on
27 inadequate training, there is no proof of that in the record.

28 There are three ways to meet the policy, practice, or custom

1 requirement for municipal liability under § 1983: (1) the
2 plaintiff may prove that a public entity employee committed the
3 alleged constitutional violation pursuant to a formal policy or a
4 longstanding practice or custom, which constitutes the standard
5 operating procedure of the local government entity; (2) the
6 plaintiff may establish that the individual who committed the
7 constitutional tort was an official with "final policy-making
8 authority" and that the challenged action itself thus constituted
9 an act of official government policy; or (3) the plaintiff may
10 prove that an official with final policy-making authority ratified
11 a subordinate's unconstitutional decision or action. *Hopper v.*
12 *City of Pasco*, 241 F.3d 1067, 1083 (9th Cir.2001)).

13 An unconstitutional policy need not be formal or written to
14 create municipal liability under § 1983; however, it must be so
15 permanent and well settled as to constitute a custom or usage with
16 the force of law. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144,
17 167-68, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Furthermore,
18 "[p]roof of a single incident of unconstitutional activity is not
19 sufficient to impose liability under *Monell*, unless proof of the
20 incident includes proof that it was caused by an existing,
21 unconstitutional municipal policy, which policy can be attributed
22 to a municipal policy maker." *Oklahoma City v. Tuttle*, 471 U.S.
23 808, 823-24, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

24 The court finds that Plaintiff has failed to provide
25 sufficient evidence of the existence of a custom or policy
26 attributable to either Defendant City of Granger or Defendant
27 Fonseca. Therefore, the *Monell* claim is hereby dismissed.

28 / / /

1 **CONSPIRACY CLAIM**

2 Defense asserts that Plaintiff Mortensen has no evidence
3 establishing a constitutional violation or that any of the
4 Defendants formed an agreement to violate her constitutional
5 rights.

6 Plaintiff argues that Defendant Mayor Fonseca met in secret
7 with Defendant Sgt. Kampert and directed him to find a way to have
8 the department heads fired which directly lead to the substantive
9 due process violation concerning Plaintiff Mortensen. Plaintiff
10 asserts there was an agreement to violate constitutional rights,
11 an overt act in furtherance of the conspiracy and a violation of
12 her substantive due process rights.

13 To prevail on a claim for conspiracy to violate one's
14 constitutional rights under § 1983, the plaintiff must show
15 specific facts to support the existence of the claimed conspiracy.
16 *Burns v. County of King*, 883 F.2d 819, 821 (9th Cir.1989). The
17 elements to establish a cause of action for conspiracy under
18 § 1983 are: (1) the existence of an express or implied agreement
19 among the defendant officers to deprive him of his constitutional
20 rights, and (2) an actual deprivation of those rights resulting
21 from that agreement. *Ting v. United States*, 927 F.2d 1504, 1512
22 (9th Cir.1991). In addition, there must be an agreement or meeting
23 of the minds to violate his constitutional rights. *Franklin v.*
24 *Fox*, 312 F.3d 423, 441 (9th Cir.2002) (citing *United Steelworkers*
25 *of Am. v. Phelps Dodge Corp.*, 865 F.2d 1539, 1540-41 (9th
26 Cir.1989) (en banc)). A formal agreement is not necessary; an
27 agreement may be inferred from the defendant's acts pursuant to
28 this scheme or other circumstantial evidence. See *United States v.*

1 *Clevenger*, 733 F.2d 1356, 1358 (9th Cir.1984).

2 "To be liable, each participant in the conspiracy need not
3 know the exact details of the plan, but each participant must at
4 least share the common objective of the conspiracy." *Id.* at 441.
5 This agreement or meeting of the minds may be inferred on the
6 basis of circumstantial evidence, such as the actions of the
7 defendants. *Mendocino Env'tl. Ctr. v. Mendocino County*, 192 F.3d
8 1283, 1301 (9th Cir.1999). A showing that defendants committed
9 acts that "are unlikely to have been undertaken without an
10 agreement" may support the inference of conspiracy. *Id.* In
11 addition, a conspiracy to violate constitutional rights must be
12 predicated on a viable underlying constitutional claim. See
13 *Thornton v. City of St. Helens*, 425 F.3d 1158, 1168 (9th
14 Cir.2005). In addition, the claim requires "an actual deprivation
15 of constitutional rights." *Hart v. Parks*, 450 F.3d 1059, 1071 (9th
16 Cir.2006). "The defendants must have, by some concerted action,
17 intended to accomplish some unlawful objective for the purpose of
18 harming another which results in damage." *Mendocino Env'tl. Ctr.*,
19 192 F.3d at 1301.

20 Here, Plaintiff has presented no evidence to support the
21 existence of an agreement or meeting of the minds between
22 Defendants, whether the agreement be specific or inferred from
23 conduct, nor does she provide any evidence that the deprivation of
24 her rights was the result of such an agreement. Although it is
25 alleged that after Defendant Fonseca was elected as mayor in
26 January of 2008, Defendant Kampert informed Officer Dave Leary
27 that he had had secret meetings with Defendant Fonseca regarding
28 how the department heads could all be fired, it is too speculative

1 to connect an alleged constitutional violation of an employee of a
2 department head to the alleged general conspiratorial objective
3 espoused here. In other words, the mere alleged unlawful arrest
4 of a department head employee, without more, is insufficient to
5 prove a conspiracy.

6 As such, Plaintiff has not met her burden to designate
7 specific facts showing that there is a genuine issue for trial as
8 to the existence of a conspiracy between defendants. Therefore,
9 Plaintiff cannot establish any basis for liability on her
10 conspiracy claim against Defendants in their individual
11 capacities. In addition, since a municipal entity cannot conspire
12 with itself, Plaintiff's claim against Defendants in their
13 official capacity fails. Accordingly, the Court grants summary
14 judgment in favor of all Defendants as to the conspiracy claim.

15 **IT IS ORDERED** that Defendants' Motion For Summary Judgment,
16 ECF No. 18, is GRANTED in part and DENIED in part. All claims,
17 **except** Plaintiff's 42 U.S.C. §1983 claim and unlawful arrest
18 claim, are **DISMISSED** with prejudice.

19 **IT IS SO ORDERED.** The District Court Executive is hereby
20 directed to enter this order and furnish copies to counsel.

21 DATED this 20th day of May, 2011.

22
23 ***s/Lonny R. Suko***

24 _____
LONNY R. SUKO
25 UNITED STATES DISTRICT JUDGE
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